STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE ENERGY CORPORATION FOR APPROVAL OF A 160-ACRE NON-STANDARD SPACING AND PRORATION UNIT AND FOR COMPULSORY POOLING, CHAVES COUNTY, NEW MEXICO

CASE NOS. 14222; 14223; 14224; 14225, 14226; 14227; 14228; 14229; 14230; and 14231

MOTION TO DISMISS

COG Operating LLC, ("COG"), through its attorneys, Montgomery and Andrews, P. A., (J. Scott Hall), moves to dismiss the Applications of Chesapeake Energy Corporation, ("Chesapeake"), in these matters. As grounds for this motion, COG states:

Background

By its Applications in each of these cases, Chesapeake seeks (1) the Division's approval of the creation of 160-acre non-standard Wolfcamp formation proration units, and (2) the forced-pooling of un-joined interests for the following lands and wells, all in T15S, R31E:

1. Case No. 14222 – Perseus 10 Federal Com Well #1H; S/2 S/2 of Section 10;
2. Case No. 14223 – Perseus 10 Federal Com Well #2H; N/2 S/2 of Section 10;
3. Case No. 14224 - Perseus 10 Federal Com Well #3H; S/2 N/2 of Section 10;
4. Case No. 14225 - Perseus 10 Federal Com Well #4H; N/2 N/2 of Section 10;
5. Case No. 14226 – Draco 14 Federal Com Well #1H; N/2 N/2 of Section 14;
6. Case No. 14227 - Draco 14 Federal Com Well #2H; S/2 N/2 of Section 14;
7. Case No. 14228 - Draco 14 Federal Com Well #3H; N/2 S/2 of Section 14;
8. Case No. 14229 – Wrinkle 13 Federal Com Well #1H; N/2 S/2 of Section 13;

9. Case No. 14230 – Wrinkle 13 Federal Com Well #2H; S/2 S/2 of Section 13;
10. Case No. 14231 – Wrinkle 13 Federal Com Well #3H; S/2 N/2 of Section 13.

The lands described in the Chesapeake applications are also the subject of compulsory pooling applications filed on behalf of COG Operating LLC:

1. Case No. 14203 – Taurus Federal Well #1; S/2 S/2 of Section 10;
2. Case No. 14204 – Taurus State Com Well #2; N/2 S/2 of Section 10;
3. Case No. 14205 – Taurus State Com Well #3; S/2 N/2 of Section 10;
4. Case No. 14206 - Taurus State Com Well #4; N/2 N/2 of Section 10;
5. Case No. 14207 – Orion Federal Com Well #1H; S/2 N/2 of Section 13;
6. Case No. 14208 – Orion Federal Well #2; N/2 S/2 of Section 13;
7. Case No. 14209 – Orion Federal Com Well #3; S/2 S/2 of Section 13;
8. Case No. 14210 – Andromeda Federal Well #1; N/2 N/2 of Section 14;
9. Case No. 14211 – Andromeda Federal Well #2; S/2 N/2 of Section 14;
10. Case No. 14212 – Andromeda Federal Well #3; N/2 S/2 of Section 14;
11. Case No. 14213 – Hercules Federal Well #1; S/2 N/2 of Section 15;
12. Case No. 14214 – Hercules Federal Com Well #2; N/2 N/2 of Section 15;
13. Case No. 14215 – Hercules Federal Com Well #3; N/2 S/2 of Section 15;
14. Case No. 14216 – Hercules Federal Com Well #4H; S/2 S/2 of Section 15.

The efforts COG has made to evaluate its acreage, negotiate working interest participation and obtain the regulatory permitting necessary to develop its prospect have far out-paced those of Chesapeake. On the other

hand, Chesapeake's pooling applications are purely reactionary, seeking to make-up for its lack of diligence to develop the area.[1]

The Chesapeake applications are notable for another reason: In each case, Chesapeake seeks to consolidate the working interests in each of the adjacent 40-acre tracts and obtain Division approval of its proposed well locations within 160-acre non-standard units so that it may traverse each of the tracts with its horizontal wellbores. However, Chesapeake does not in every case own an interest in each of the 40-acre tracts it plans to penetrate with its horizontal wellbore.

According to Chesapeake, this situation is impermissible.

Contemporaneous with the filing of the ten applications for non-standard units and compulsory pooling listed above, Chesapeake filed the following:

1. Case No. 14217; Application of Chesapeake Energy Corporation for Cancellation of Certain Permits to Drill ("APD's") issued to COG Operating, LLC, Chaves County, New Mexico
2. Case No. 14218; Application of Chesapeake Energy Corporation for Cancellation of Certain Permits to Drill ("APD's") issued to COG Operating, LLC, Chaves County, New Mexico; and
3. Case No. 14219; Application of Chesapeake Energy Corporation for Cancellation of Certain Permits to Drill ("APD's") issued to COG Operating, LLC, Chaves County, New Mexico.

By these Applications, Chesapeake seeks to cancel and deny drilling permits for the following COG wells:

1. Case No. 14217:
   a. Taurus Federal Well #1 – S/2 S/2 of Section 10;
   b. Taurus State Well #2 – N/2 S/2 of Section 10;
   c. Taurus State Well #3 – S/2 N/2 of Section 10;
   d. Taurus State Well #4 – N/2 N/2 of Section 10.

2. Case No. 14218:
   a. Andromeda Federal Well #1 – N/2 N/2 of Section 14;
   b. Andromeda Federal Well #2 – S/2 N/2 of Section 14;

[1] Chesapeake has simultaneously filed similar applications in the following cases: Case Nos. 14233; 14234; 14235; 14236 and 14237. COG does not have lease interests in the units affected by those Applications.

3. Case No. 14219:
   a. Orion Federal Well #1H – S/2 N/2 of Section 13;
   b. Orion Federal Well #2H – N/2 S/2 of Section 13;
   c. Orion Federal Well #3H – S/2 S/2 of Section 13.

In its three Applications, Chesapeake contends that COG cannot drill its wells and the Division is required to cancel COG's APD's:

(1) *"...because COG Operating LLC wellbores will penetrate 40-acre tracts in which COG Oil & Gas LP (the parent ownership company for whom COG is the operating company) has no interest and has not reached a voluntary agreement with Chesapeake or Chevron (now Cimarex) or obtained a Division compulsory pooling order."* (See *Application*, para. 6, Case No. 14217);

(2) *"...because COG Operating LLC had placed the bottom hole location and proposes to penetrate tracts for both of these wells on the Chase lease and had not reached a voluntary agreement with Chase or obtained a Division compulsory pooling order.* (See *Application*, para. 5, Case No. 14218); and

(3) *"...because COG Operating LLC had placed the bottom hole location on Penroc's lease or proposed to penetrate a tract in which COG Oil & Gas LP had no interest and had not reached a voluntary agreement with Penroc or obtained a Division compulsory pooling order."* (See *Application*, para. 5, Case No. 14219.)[2]

Chesapeake cannot simultaneously maintain its APD cancellation applications while seeking approval of its force pooled non-standard units for horizontal wells that traverse 40-acre tract's where it owns no interest. Chesapeake's compulsory pooling applications and it's APD cancellation applications are diametrically opposed to each other. Chesapeake cannot be permitted to assert to the Division that the grounds on which COG's permits should be cancelled do not apply to Chesapeake's own permit applications. Chesapeake's assertion of these inconsistent positions violates both the election of remedies doctrine and the doctrine of judicial estoppel. Chesapeake's pooling applications must therefore be dismissed.

[2] Chesapeake's Applications in Cases 14217, 14218 and 14219 are not the subject of this Motion to Dismiss. Chesapeake should be directed to provide evidentiary and legal support for these Applications at a hearing on the merits.

POINTS AND AUTHORITIES

Election of remedies

The election of remedies doctrine bars the pursuit of inconsistent claims for relief. *Smart v. Sunshine Potato Flakes, LLC*, 307 F.3d 684 (8th Cir. 2002). "Under the election of remedies doctrine, two remedies may be inconsistent for a number of reasons, including that one remedy is based on a theory that involves the negation or repudiation of another asserted remedy." *Salazar v. Torres*, 2005-NMCA-127, 138 N.M. 510, 122 P.3d 1279 (Ct. App. 2005) (internal quotation marks omitted). In this case, Chesapeake's theory that COG's permits should be cancelled because COG wellbores will penetrate 40-acre tracts in which COG has no interest plainly "involves the negation or repudiation of another asserted remedy," i.e., that Chesapeake's permits should be approved *despite the fact* that Chesapeake wellbores will also penetrate 40-acre tracts in which Chesapeake has no interest. In more colloquial terms, Chesapeake is asserting that what's good for the goose in this case does not apply to the gander. Such a proposition violates the doctrine of election of remedies.

Moreover, under the election doctrine a litigant may not assert one interpretation of the facts that would entitle him or her to a particular relief and then assume a contrary interpretation that would entitle the litigant to inconsistent relief. *Dionne v. Mayor and City Council of* Baltimore, 40 F.3d 677 (4th Cir. 1994); *Perez v. Boatmen's Nat'l Bank of St.* Louis, 788 S.W.2d 296 (Mo. Ct. App. E.D. 1990). In this case, Chesapeake is attempting to establish under the same set of facts that COG's permits were not properly issued but that Chesapeake should be issued permits for the same units despite the fact that their applications bear the same claimed deficiencies that allegedly mandate the cancellation of COG's permits (i.e., lack of interest in affected parcels.) As a matter of administrative economy and efficiency, the Division should not allow Chesapeake to consume Division resources to pursue these inconsistent interpretations of the undisputed facts. Under NMSA §70-2-14, the Division's examiner has the authority "*. . . to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient orderly conduct of such hearing[s].*" Thus, the examiner is fully authorized to grant this Motion to Dismiss.

Judicial/administrative estoppel

The positions Chesapeake seeks to advance inevitably violate the doctrine of judicial estoppel. Judicial estoppel has been described as a companion doctrine to the election of remedies doctrine, *see Gens v.*

Resolution Trust Corp., 112 F.3d 569 (1st Cir. 1997), and is an equitable doctrine that "generally prevents a party from prevailing in one phase of a case on an argument and relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 748, 749 (2001). The doctrine of judicial estoppel "prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Rodriguez v. La Mesilla Constr. Co.*, 1997-NMCA-062, ¶20, 123 N.M. 489, 943 P.2d 136. The doctrine precludes "parties from deliberately changing positions according to the exigencies of the moment," and prevents them from "playing fast and loose with the courts." *New Hampshire*, 532 U.S. at 750. Importantly, the doctrine has been consistently applied to administrative proceedings, and is known in this context as administrative estoppel. *See, e.g., Muellner v. Mars Inc.*, 714 F.Supp. 351, 357 (N.D. Ill. 1989) ("The truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.").

The threshold requirement that Chesapeake succeed in establishing its position that COG's permit applications were defective has not yet been met. However, should Chesapeake successfully convince the Division that COG's permits were improperly issued because COG wellbores will penetrate 40-acre tracts in which COG has no interest, they would be estopped from then maintaining in support of their applications for drilling the same units that *despite the fact* that Chesapeake wellbores will penetrate 40-acre tracts in which Chesapeake has no interest. Judicial estoppel is supported by "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings." *Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996). In these interests, the Division should not allow Chesapeake to potentially violate the doctrine of judicial (i.e., administrative) estoppel and consume Division resources arguing conflicting claims from the same nucleus of operative fact.

WHEREFORE, COG requests the Division enter its Order dismissing the referenced compulsory pooling/non-standard unit Applications filed on behalf of Chesapeake Energy Corporation.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 20th day of October, 2008 a copy of the foregoing was faxed to the following:

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